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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: LIN-00-137-51517 Office: Nebraska Service Center

Date: JAN 22 2002

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

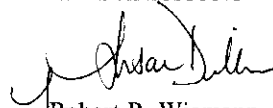
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a company engaged in the wholesale sale and distribution of medical and health products which has 120 employees and a gross annual income of \$157,603,542. It seeks to employ the beneficiary as a manager of its new workout facility for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submitted a statement and additional documentation.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

The director denied the petition because the petitioner had not established that the proffered position is a specialty occupation. On appeal, counsel argues in part that the proffered position qualifies as a specialty occupation because the petitioner requires a bachelor's degree from "a limited number of academic fields" in addition to specialized experience as a physical therapist for the position.

Counsel's argument is not persuasive. In the initial I-129 petition, the petitioner stated that it has opened a new workout facility with exercise machinery and equipment for the benefit of its employees. The petitioner indicated that it wishes to employ the beneficiary to manage the facility and described the duties of the offered position as follows:

[The beneficiary] will manage said facility, helping employees design an appropriate workout program, and, in the event of any employee injuries, whether on or off the worksite, because of her physical therapy background, she can help them rehabilitate. As many of [o]rganization's employees are immigrants, and [the beneficiary] speaks

English, Polish and Russian fluently, she will be of assistance in communicating with all employees.

On appeal, the petitioner provided the following amended description of the duties of the proffered position:

- * Manage the exercise and fitness center, not from a business point-of-view, but from an in-house therapy center perspective, keeping in mind that the products [the company] sell[s] and distribute[s] are home based fitness products.
- * [E]valuate each individual in regard to functional ability, by applying various tests and measurements and obtain supportive data in order to plan individualized programs of treatment, utilizing [the company's] current products, as well as testing products of the future, evaluating these products, and recommending modifications;
- * Administer therapeutic exercises and instruct users of the facility in muscle re-education, relaxation and gait-training;
- * Plan and instruct users on programs of exercises and modalities utilizing [the company's] products;
- * Monitor equipment and evaluate use of [the company's] products and effectiveness to then report to product development personnel, and marketing personnel regarding potential uses of products, potential new and improved products all to benefit in-home users as well as center users.
- * Respond to request for reports on product effectiveness both internally and externally, to media and public relations.

Pursuant to 8 C.F.R. 214.2(h) (4) (iii) (A), to qualify as a specialty occupation, the position must meet one of the following criteria:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

The director determined that the proffered position appears to combine the duties of a manager, a physical therapist, and a recreational worker. Upon further review, it is determined that the proffered position appears to be that of a personal trainer. A review of the Department of Labor's Occupational Outlook Handbook, (Handbook), 2000-2001 edition, at page 179 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a sports and physical training instructor. The usual requirement is experience as a player/participant or coach. A baccalaureate degree is required for coaches and sports instructors in schools but there is no indication that a degree in a specialized area is required.

While the beneficiary's physical therapy training may be useful in developing rehabilitation programs for injured employees, this activity is not a primary duty of the proffered position. Based on the foregoing, the Service is not persuaded to classify the proffered position as that of a physical therapist.

The petitioner also states the beneficiary will test the company's home health care products by using them in conjunction with exercise programs at the workout facility and report back to the product development and marketing departments with suggestions regarding current and potential new products. However, the petitioner has not submitted any evidence to show that this duty requires an individual with a baccalaureate degree in a specialized area. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary. The petitioner's stated desire to employ the beneficiary for the proffered position is not sufficient to qualify the proffered position as a specialty occupation.

Further, regarding the beneficiary's ability to speak Polish and Russian with employees from other countries, the petitioner has not established that this duty is of such complexity that a baccalaureate degree in a specific specialty is required for the proffered position.

The record does not contain any documentary evidence that businesses similar to it in their type of operations, number of

employees, and amount of gross annual income, require the services of individuals in parallel positions.

Finally, the petitioner did not establish that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Beyond the decision of the director, it is noted that the petition has not submitted a certified labor condition application. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.